No. 86-2066

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MINORU YASUI and TRUE S. YASUI,
Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEGGY NAGAE LUM
Betts, Patterson
& Mines, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle,
Washington 98161-1090
(206) 292-9988
Counsel of Record

CLAYTON C. PATRICK
P.O. Box 344
Salem, Oregon 97308
(503) 581-9292

September 24, 1987

Additional counsel on inside front cover.

Additional counsel:

DON S. WILLNER
Willner & Kelly
Suite 303
111 S.W. Front Ave.
Portland, Oregon 97204
(503) 220-0328

FRANK CHUMAN
5306 Angeles Crest Hwy.
La Canada/Flintridge,
California 91011
(818) 952-9019

WM. SCOTT MEISNER
127 North Lawrence
Eugene, Oregon 97401
(503) 344-4465

BERT K. FUKUMOTO
Suite 800
520 S.W. Yamhill
Portland, Oregon 97204
(503) 226-6151

STEPHEN L. GRIFFITH
Suite 2300
900 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 294-9203

Counsel for Petitioner
and True S. Yasui

EDITOR'S NOTE

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PETITIONERS' REPLY BRIEF

I.

INTRODUCTION

The government's response to the Petition for Writ of Certiorari submitted by Minoru and True S. Yasui distorts the real issues before this Court. Although the government treats this case mechanically and superficially as an ordinary criminal matter, it is not. As the Court is well aware, Mr. Yasui's case arises out of circumstances presenting among the most

profound and fundamental constitutional questions. Moreover, the charges of prosecutorial misconduct and fraud upon the courts asserted in the underlying Petition, which are supported by abundant evidence from the government's own records, present equally profound and disturbing questions regarding the integrity of our judicial system and our most basic civil liberties in times of crisis. These issues are too alive and too pressing to die with Mr. Yasui.

Throughout his entire life, Mr. Yasui sought to correct the grave injustice perpetrated by the government on this Court and the American people in the 1940's. Even though the government continually seeks to sweep the entire episode quietly under the rug, and thereby perpetuate its wrongdoing of over forty years, our system of justice is not so

blind or rigid. These issues of monumental importance cry out for hearing and resolution and overwhelmingly outweigh any factors which would lead to summary abatement of an ordinary case. Accordingly, the writ of certiorari should be granted in order to consider fully and resolve finally fundamental issues regarding the heart of American constitutional guarantees, governmental responsibilities and tainted judicial records raised in this case.

II.

THIS EXTRAORDINARY CORAM NOBIS CASE IS NOT SUSCEPTIBLE TO A MECHANICAL APPLICATION OF THE ABATEMENT RULE.

The government's assertion regarding abatement in ordinary criminal cases clouds the real issue in this proceeding. (Gov. Br., p. 4.) This is not a simple criminal appeal or collateral attack like those cases cited by the government, but

is instead an unquestionably extraordinary petition for writ of error coram nobis.[1] The government presents **no** authority on the resolution of **coram nobis petitions** upon a petitioner's death. In fact there are **no** reported cases in which a **coram nobis** action abated upon the death of petitioner. Further, in none of the cases cited by the government does it appear that the petitioner or substitute party contested the abatement or raised issues in any way similar to those extraordinary questions presented in the instant case.

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[1] Solicitor General Fried admitted as much to this Court at the oral argument of *United States v. Hohri*, No. 86-510, April 20, 1987, pages 4-5 of Official Transcript Proceedings: "It is this basing of our action on a judgment of what Justice Murphy in his dissent correctly identified as a sort of amateur socio-anthropology with a frankly racist cast which was our %tame [*sic:* "shame"]. . . . Respondents complain now, as they did then, that this was a wrong judgment. It was."

Accordingly, because the facts in these cases did not support the need for their continuation, they do not support the government's position.

Where such extraordinary issues **do** exist, courts have **not** mechanically applied the mootness doctrine -- for example, where an issue is capable of repetition, but would evade review were the mootness doctrine to be mechanically applied. A case is not moot if it attacks either a "continuing harm or a significant prospect of future harm." L. Tribe, *American Constitutional Law* § 3-14, at 63 (1978). It only becomes moot if it has lost "its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." *Hall v. Beals,* 396 U.S. 45, 48 (1969).

Additionally, in *Moore v. Ogilvie,*

394 U.S. 814 (1969) this Court found justiciable rather than moot the validity of a petition requirement for candidates for public office, even though the claim was based upon conduct which arose out of an already completed election. The fact that the election was over did not moot the case because the issues could arise again without opportunity for review if the mootness doctrine were mechanically applied.

In the instant case, the egregious governmental wrongdoing alleged by Petitioners is definitely capable of repetition, but review would be denied if the mootness doctrine were mechanically applied. Mr Yasui's 1943 test case is unique -- no other avenue is available to review the misconduct perpetrated by the government on Mr. Yasui, the American people and this Court. This is not just

another criminal case, but a profound example of governmental fraud. In its decision this Court upheld the racially discriminatory incarceration of over 110,000 persons and condoned one of the most sweeping deprivations of civil liberties in modern times.

The policy behind the mootness doctrine, to require a real case or controversy before the court will adjudicate the issues presented, does not require abatement of this case. There is a real continuing case and controversy in the instant proceeding, despite Mr. Yasui's death. The issues raised do not affect just one individual, but have had and will continue to have a profound impact on Americans of all races. The mootness doctrine must not be used by the government as a shield to perpetuate its fraud and to evade review of these

critically important constitutional questions.

III.

THIS CORAM NOBIS ACTION MUST SURVIVE, AS DO CIVIL RIGHTS CASES, IN ORDER TO EFFECT JUSTICE.

The government's argument that the principles governing the survival of civil rights actions may not be applied to coram nobis proceedings is equally specious and simplistic. (Gov. Br., pp. 4-5.) While no survival statute explicitly applies to coram nobis petitions, it is likewise true that **no federal statute expressly provides for the survival of actions brought under the Civil Rights Statutes**. Nonetheless, in construing 42 U.S.C. § 1988 courts have applied state survival statutes in order to effect justice in civil rights cases. *Robertson v. Wegmann,* 436 U.S. 584, 591-92 (1978); *Hall v. Wooten,* 506 F.2d 564, 569 (6th Cir. 1974).

For the same reason, this Court should also provide for the survival of this coram nobis proceeding. Courts have repeatedly recognized that coram nobis proceedings are largely civil in nature.[2] Since this case presents issues closely analogous to a civil action for redress of violations of civil rights and liberties, the same survival principles should

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[2] Several Circuits have found coram nobis to be civil in nature. *See, United States v. Keogh,* 391 F.2d 138, 140 (2d Cir. 1968); *Neely v. United States,* 546 F.2d 1059, 1066 (3rd Cir. 1976); and *United States v. Balistrieri,* 606 F.2d 216, 221 (7th Cir. 1979). *Cf. United States v. Mills,* 430 F.2d 526, 527-28 (8th Cir. 1970). Moreover, in *United States v. Taylor,* 648 F.2d 565, 571 n.21, 573 & n.25 (9th Cir.), *cert. denied,* 454 U.S. 866 (1981), the Ninth Circuit ruled that substantive issues in coram nobis cases should be analyzed according to civil rules.

Contrary to the weight of authority in other circuits, the Ninth Circuit has also inexplicably ruled that coram nobis proceedings are criminal in nature for the purpose of determining the time for filing notice of appeal. *Yasui v. United States,* 772 F.2d 1496, 1499 (9th Cir. 1985).

control. (Pet. for Cert., pp. 24-34.) As the Fifth Circuit ruled in the civil rights context, so should this Court rule in the present case:

> . . . it defies history to conclude that Congress purposely meant to **assure to the living** freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes **against the peril of death**. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions.

Brazier v. Cherry, 293 F.2d 401, 404 (5th Cir.), *cert. denied,* 368 U.S. 921 (1961) (emphasis added).

That this proceeding does not seek monetary damages is absolutely irrelevant. (*See* Gov. Br., p. 5.) Moreover, contrary to the government's contention, civil rights actions are not limited to claims for monetary relief. In remedying civil

rights violations, courts have not hesitated to invoke their long-established equitable powers to effect justice:[3] to order closure of facilities, imposition of hiring quotas and affirmative action, release of patients or prisoners, enrollment on voting lists, reapportionment, and other non-monetary relief, including specifically **expungement of criminal records**. *See, e.g., Chapman v. Kleindienst,* 507 F.2d 1246 (7th Cir. 1974).

The government's narrow reading of the Civil Rights Statutes mirrors its

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[3] This is particularly true in cases of racial discrimination. Where

> . . . racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965)).

refusal to acknowledge the critical importance of the issues presented and the wrongs inflicted in this case which compel full resolution of the case on its merits. The injustices of Mr. Yasui's unconstitutional wartime conviction continue beyond his death. The same principles of justice which compel the survival of civil rights claims also compel the survival of this proceeding. The Court must grant this Petition for Writ of Certiorari and exercise its power and duty to effect justice.

IV.

THIS COURT HAS A DUTY OF INDEPENDENT REVIEW REGARDLESS OF WHETHER THE GOVERNMENT CONFESSED OR DENIED ERROR.

The government's argument that because it has not "confessed error," this Court has no duty -- or right -- of independent review is simplistic and misleading. (Gov. Br., p. 6.) It is

precisely **because** the government has not confessed error, and indeed expressly denies the egregious fraud on this Court which was charged and documented by Mr. Yasui in his coram nobis petition, that the underlying merits of these charges must be adjudicated.

As Petitioners have shown, this Court has a duty of independent review **regardless** of whether the government confessed or denied error. *Petite v. United States,* 361 U.S. 529, 533 (1960); *Young v. United States,* 315 U.S. 257, 258 (1942). (*See also* Pet. for Cert., pp. 34-41.) The government, however, implies that because this case "does not involve a confession of error," this Court should decline to examine the matter independently. Such an argument is completely contrary to this Court's prior holdings. (Pet. for Cert., pp. 34-41.)

Instead of forthrightly confessing its fraud upon the courts and other misconduct, the government only moved the district court to vacate Mr. Yasui's conviction and to dismiss his coram nobis petition, because "it would not be appropriate to defend this forty year old misdemeanor conviction," and because of its self-serving conclusion that the "national interests" required "put[ting] behind us the controversy which led to the curfew and mass evacuation in 1942." (Government's Response and Motion, Doc. 25 filed in the district court.) This amounts to nothing more than improper promulgation of national policy by a government attorney. The government's motion, based on this self-serving policy, allows the government to avoid confronting further exposure of its own wrongdoing, fails to prevent future discrimination of

this kind, and violates the public interest. As Justice Brennan concluded, in another case where the government moved to vacate judgment without confession of error,

> The Government has commendably done the just and right thing in asking us to wipe the slate clean of this second federal conviction for the same criminal conduct. But with all deference, I do not see how our duty can be fully performed in this case if our action stops with simply giving effect to a "policy" of the Government -- a policy whose only written expression does not even cover the case at bar.

Petite v. United States, 361 U.S. 529, 533 (1960). (*See* Pet. for Cert. pp. 34-41.)

In *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), the court rejected the government's contention that its motion to dismiss prevented the court from reviewing the substance of Mr. Korematsu's identical charges of fraud and

misconduct. The court observed:

> The government has, however, while not confessing error, taken a position tantamount to a confession of error. It has eagerly moved to dismiss without acknowledging any specific reasons for dismissal other than that "there is no further usefulness to be served by conviction under a statute which has been soundly repudiated." (R.T. 13:20-22, November 10, 1983). In support of this statement, the government points out that in 1971, legislation was adopted requiring congressional action before an Executive Order such as Executive Order 9066 can ever be issued again; that in 1976, the statute under which petitioner was convicted was repealed; and that in 1976, all authority conferred by Executive Order 9066 was formally proclaimed terminated as of December 31, 1946. While these are compelling reasons for concluding that vacating the conviction is in the best interests of this petitioner, respondent and the public, the court declines the invitation of the government to treat this matter in the perfunctory and procedurally improper manner it has suggested.

584 F.Supp. at 1413.

The government's argument that its refusal to confess error deprives this Court of jurisdiction to adjudicate this pending controversy is not only specious, it is dangerous. It is frighteningly reminiscent of the entire history of this case, where the **government's own actions** denied Mr. Yasui a fair trial and kept from him and this Court evidence that his conviction was unconstitutionally obtained. The government may not -- must not -- be allowed to thwart the fair and proper adjudication of Mr. Yasui's case a second time. As this Court has stated,

> . . . a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.

Sibron v. New York, 392 U.S. 40, 53 (1968).

The government's wartime misconduct

deprived Mr. Yasui of all his rights under the United States Constitution, and denied him a fair trial and fair appeal. The government's suppression, destruction and alteration of evidence not only injured Mr. Yasui, but injured this Court, the Constitution, and the American people as well. Especially in this bicentennial of the Constitution it is hardly an exaggeration to say that the Supreme Court of the United States has a stake at least equal to Petitioners' in seeing that this Petition for Writ of Error Coram Nobis is resolved on its merits, and that justice is restored.

V.

CONCLUSION

As it has throughout these proceedings, the government seeks to belittle the importance of Mr. Yasui's case by stating that it is "not a class action," does not

"seek any relief for other Japanese-Americans," and is just "an individual action." (Gov. Br., p. 7.) These characterizations ring singularly hollow since it is universally acknowledged that Mr. Yasui's case, together with this Court's decisions in *Korematsu v. United States,* 323 U.S. 214 (1944) and *Hirabayashi v. United States,* 320 U.S. 80 (1943) were the critically important test cases which would affect, did affect, and **still do affect** all Japanese Americans, and in fact, all Americans. To argue otherwise is simply to deny reality.

Thus there remains a crucial and pressing need to adjudicate fully this case to erase the blight of the 1943 precedent, and to prevent such gross governmental misconduct from ever happening again. Petitioners do not ask this Court to adjudicate the coram nobis

petition, nor do they seek any guarantee of success. But they do seek, after 44 years, a genuine hearing on the merits of the most egregious and disturbing deprivation of civil rights and liberties in our lifetimes. Therefore, Petitioners respectfully request that this Court grant certiorari to allow the full and complete adjudication of these fundamental questions of national importance.

Respectfully submitted,

PEGGY NAGAE LUM

Counsel of Record

CLAYTON C. PATRICK
DON S. WILLNER
FRANK CHUMAN
WM. SCOTT MEISNER
BERT K. FUKUMOTO
STEPHEN L. GRIFFITH

Counsel for Petitioners
Minoru and True S. Yasui

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